

AMERICA'S
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January 27, 1993

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[JAN 27 1993]

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: MM Docket No. 92-266

Dear Ms. Searcy:

Enclosed is an original and (9) nine copies of the comments filed by the Association of America's Public Television Stations in the above-captioned docket on January 27, 1993. Also enclosed is an additional copy to be date-stamped by the clerk and returned to our messenger.

Respectfully submitted,

Marilyn Mohrman-Gillis

Marilyn Mohrman-Gillis
General Counsel

MMG:j
Enclosures: (11)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-266

In the Matter of)
)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

**COMMENTS OF THE ASSOCIATION OF
AMERICA'S PUBLIC TELEVISION STATIONS**

The Association of America's Public Television Stations (APTS) respectfully files comments in response to the above captioned Notice of Proposed Rulemaking.¹ APTS files on issues raised by the Commission regarding the commercial leased access provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 612(b) [hereinafter "1992 Cable Act"]. Specifically APTS comments on the Commission's inquiry into the need for lower rates for not-for-profit programmers to utilize the commercial leased access channels, and the authority of the Commission under 1992 Act to set lower rates for such programmers.

APTS is a private, nonprofit membership organization whose members comprise virtually all of the nation's 345 public television stations. APTS represents its members on a

¹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266 (released Dec. 24, 1992) [hereinafter "Notice"].

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national level by presenting public television stations' views to the Commission, Congress and other federal agencies and policy-makers.

I. The Commission Is Empowered by Congress to Set Lower Rates for the Use of Leased Commercial Access Channels by Not-For-Profit Programmers

The Notice asks, among other things, whether the 1992 Cable Act empowers the Commission to set a lower maximum rate for leased commercial access for not-for-profit programmers. APTS submits that the provisions of Section 612 of the 1984 Cable Act,² coupled with the amendments to that section in the 1992 Cable Act very clearly give the Commission the authority to set lower maximum rates for non-profit programmers.

The leased access provision, first adopted in the 1984 Cable Act, was designed to "assure that the widest possible diversity of information sources are made available to the public."³ To further this goal, Congress made clear that it intended that non-profit programmers be charged a lower rate for use of the leased commercial access channels:

[Section 612] does contemplate permitting the cable operator to establish rates, terms and conditions which are discriminatory....Non-discriminatory

² Cable Communications Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984) (codified at 47 U.S.C. § 532) [hereinafter "1984 Cable Act"].

³ Id. at § 612(a), 47 U.S.C. § 532(a).

access requirements could well undermine diversity goals....Thus, by establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system.⁴

Unfortunately, as Congress recognized, leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure. Congress concluded that the principal reason for this deficiency was that cable operators, whose interests clashed with those of programmers seeking to use the leased access channels, had virtually unchecked discretion to establish rates, terms and conditions of carriage.⁵ Congress further concluded that the rates, terms and conditions set by the operators were unreasonable, and the complaint mechanism set up by Congress to challenge the unreasonable rates was ineffective.⁶

Congress attempted to remedy these deficiencies by amending Section 612 of the 1984 Cable Act to switch the responsibility to the FCC to determine maximum reasonable rates and reasonable terms and conditions for use of the

⁴ H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984) [hereinafter "1984 House Report"].

⁵ S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991) [hereinafter "1991 Senate Report"]. The House Committee was concerned that cable operators had financial incentives to refuse leased access to programmers whose services may compete with cable services, especially when the cable operator had a financial interest in the program services it carried. H.R. Rep. No. 628, 102d Cong., 2d Sess. 39 (1992) [hereinafter "1992 House Report"].

⁶ 1992 House Report at 39.

commercial leased access channels. The amendments also direct the Commission to establish procedures for expedited resolution of disputes concerning rates for carriage under Section 612.⁷ The amendments do nothing to change the basic leased access provision of the 1984 Act or its goal of promoting diverse sources of programming. Rather the amendments strengthen these provisions by transferring rate setting responsibility to the Commission, instructing the Commission to put teeth into the enforcement provision, and adding, as a second purpose for the leased access provision: "to promote competition in the delivery of diverse sources of video programming."⁸

Accordingly, the explicit authority and encouragement expressed in the 1984 Act to set lower rates for non-profit users of the leased access channels has not been modified by the amendments to Section 612 in the 1992 Cable Act. The rate setting responsibility transferred from the cable operators to the Commission carries with it the same explicit authority afforded cable operators in the 1984 Act: to set discriminatory rates, terms and conditions to facilitate access to the cable system by non-profit programmers.

⁷ 1992 Cable Act § 9(b), 47 U.S.C. § 532(b), amending § 612 of the 1984 Cable Act.

⁸ Id. § 9, 47 U.S.C. § 532.

II. Lower Rates for Not-For-Profit Programmers Would Enable Public Television Stations to Utilize the Leased Access Channels to Provide Wider Access to Noncommercial Educational Programming

The Notice also solicits comment on the need for special rates for non-profit programmers. While the "must carry" requirements of Section 5 of the 1992 Cable Act (47 U.S.C. § 615) provide for carriage of the signals of local public television stations on cable systems, new technological developments may soon make these carriage provisions inadequate and obsolete. Digital compression technology, that will be incorporated into the new Public Broadcasting Service's (PBS) satellite system, Telstar 401, will enable public television to provide multiple channels of noncommercial educational programming that must be delivered the last mile to schools and homes. Public television is currently developing new noncommercial educational programming including, for example, math, science, foreign language, and ready to learn program services. If priced appropriately, leased access channels can be an important mechanism for distributing this programming through cable systems to school and home subscribers.

Making the leased access channels available to non-profit programmers, including public television, at lower rates will further the dual purposes of the leased access provision of the 1984 and 1992 Cable Acts: to help assure the widest possible diversity of information services to the public and to promote competition in the delivery of diverse

sources of video programming.⁹ It will also further Congress' substantial interest, articulated in the 1992 Cable Act, "in ensuring that cable subscribers have access to local noncommercial educational stations" and in "making all nonduplicative local public television services available on cable systems."¹⁰

In other proceedings before the Commission, APTS has discussed at length the need and justification for no or reduced rates for the distribution of noncommercial educational programming services.¹¹ Very simply, public television, is not distributing programming to make a profit, but rather to provide a direct alternative to the commercially motivated and funded programming available both over the air and on our nation's cable systems. It cannot, by definition, provide a non-profit program service and pay

⁹ 1984 Cable Act § 612(a); 1992 Cable Act § 9(a).

¹⁰ 1992 Cable Act §§2(a)(7) and (8). This is consistent with Congress' broader interest "to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies...." The Public Telecommunications Act of 1992 § 396 (a)(9), Pub. L. No. 102-356, 106 Stat. 949 (1992).

¹¹ See e.g., Joint Petition for Reconsideration of the Association of America's Public Television Stations and Corporation for Public Broadcasting in CC Docket No. 87-266, filed Oct. 9, 1992 and Comments of the Association of America's Public Television Stations in CC Docket No. 87-266, filed Feb. 3, 1992 (video dialtone).

commercial marketplace rates for the distribution of those services.

Congress recognized this marketplace reality when it specifically authorized discriminatory rates for use of the leased access channels: "by establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system."¹² True diversity of program sources on the leased access channels - including non-profit programmers -- can only be achieved by the establishing lower rates for the non-profit users of the commercial leased access channels.

Respectfully submitted,

AMERICA'S PUBLIC TELEVISION
STATIONS

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¹² 1984 House Report at 51.